STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2013
v	No. 309750 St. Clair Circuit Court
EDWARD MICHAELSHAUN BRABSON, Defendant-Appellant.	LC No. 11-002706-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 309815 St. Clair Circuit Court
ADAM NATHAN HENDERSON, Defendant-Appellant.	LC No. 11-002707-FH

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

In these consolidated cases defendants appeal as of right their convictions of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant Brabson as a fourth habitual offender, MCL 769.12, to 10 to 25 years in prison and sentenced defendant Henderson as a second habitual offender, MCL 769.11, to 4 to 25 years in prison. We affirm.

On May 3, 2011, Jay Donachy arrived home around 11:00 p.m. and saw that his home was being robbed. Soon after, Donachy's neighbor, Jeanne Atkinson, approached with a man named Charles Gillett. Atkinson had heard Donachy yelling about the robbery and had gone outside to see what happened. She saw two to three men running in the dark away from the trailer and pursued them. One of the men, Gillett, stopped running and came toward her. She grabbed his arm and "escort[ed] him back to [Donachy's] trailer."

Gillett testified that he participated in the break-in of Donachy's residence. He indicated that he received a phone call from defendant, Edward Brabson, at 8:30 or 9:00 p.m. telling him

that he had a way for Gillett to "make some money." Gillett said that Brabson told him to meet him at "Tattoo Sam's" house. At Tattoo Sam's he spoke with defendants, Brabson and Adam Henderson, and was told by defendants that they were going to "pick up a TV and a few electronics." Gillett agreed to drive his vehicle to the site of the planned break-in. Later that night Gillett, defendants, and an indentified female broke into Donachy's trailer and attempted to rob it.

Soon after the break-in, Donachy returned and defendants "jump[ed] out of the back door of the house" and ran away. Gillett ran after defendants to "tell them to stop" because he did not want to get "caught for the whole thing." Gillett ran back toward the house, where "the neighbor grabbed me by the arm and took me over to my vehicle." Gillett testified that he was "cooperative" with the neighbor and waited until the police arrived. Gillett acknowledged that initially he did not identify the other suspects in the break-in, but later agreed to identify defendants.

I. GREAT WEIGHT OF THE EVIDENCE; INSUFFICIENT EVIDENCE

Brabson argues his conviction was against the great weight of the evidence, while Henderson argues that there was insufficient evidence to support his conviction. Defendants both claim that Gillett was too unreliable as a witness for the jury to find defendants guilty beyond a reasonable doubt. We disagree with the assertions made by defendants.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

We review de novo a challenge to the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). This Court, after viewing the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Brabson argues that Gillett was not a reliable witness because he admittedly lied during his interviews with police and because he may have been upset with Brabson over reports that Brabson had a nude photograph of Gillett's girlfriend on his cell phone.

Brabson offered alibi testimony, but the witnesses could not vouch for his whereabouts during the entire evening in which the incident occurred. The investigating officer testified that he observed both defendants and Gillett on a store surveillance video on the night of the incident. The testimony of Brabson's alibi witnesses was vague; it was not error for the jury to conclude

that Gillett's identification of Brabson as one of the perpetrators was credible. The jury was entitled to accept Gillett's testimony and reject that given by Brabson's alibi witnesses. *Milstead*, 250 Mich App at 404.

Henderson asserts that Gillett's identification of him as a co-perpetrator was weak and suspicious due to Gillette's ulterior motive in obtaining a plea deal in exchange for identifying other suspects in the home invasion. We find neither argument to be persuasive. Henderson also offered alibi testimony from witnesses who testified that they were with him during most of the evening hours in which the home invasion occurred. Here again, the jury apparently found Gillett to be a more credible witness than the alibi witnesses. The jury was entitled to do so. *Id.*

Furthermore, both defense attorneys challenged Gillett's credibility during their cross-examination of him. His dishonesty with law enforcement, and possible ulterior motives for testifying against defendants, including obtaining a plea deal and rumors that Brabson had naked pictures of Gillett's girlfriend, were presented in evidence for the jury's consideration, and the jury was aware of the reasons why defendants claim Gillett was an unreliable witness. The decision whether to accept or disregard these challenges to Gillett's credibility was entirely for the jury to make.

II. PROSECUTORIAL MISCONDUCT

Brabson also argues that the prosecutor's repeated statements during rebuttal argument that defendants could not "explain away" certain evidence offered by the prosecution constituted misconduct which denied him a fair trial by improperly shifting the burden of proof. We disagree.

"A prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). During closing argument counsel for Brabson asked the jury to consider whether Gillett was a credible witness. Defense counsel asserted that Gillette had made so many inconsistent statements that his testimony could not be believed, and cited specific portions of Gillett's testimony to emphasize the point. The prosecution's comments on rebuttal were in direct response to defense counsel's arguments, and as such, they were not prosecutorial misconduct. *Id.* Moreover, defense counsel did not render ineffective assistance by failing to object to the prosecutor's comments because any such objection would have been futile. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

III. SCORING GUIDELINES

Lastly, Henderson argues that the trial court improperly scored Offense Variable (OV) 4, MCL 777.34, psychological injury to a victim, at 10 points because there was insufficient evidence that the victim suffered a serious psychological injury. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; ___ NW2d ___ (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

Findings of fact are clearly erroneous where the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *People v LeFlore*, 122 Mich App 314, 319, 333 NW2d 47, 49 (1983).

A score of 10 points for OV 4 may be assessed where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Henderson argues that the harm demonstrated by the victim did not rise to the level of injury contemplated by the statute. Henderson asserts that the victim's reports of anxiety, fear, weight loss, and trouble sleeping were not necessarily attributable to the crime and might have been due to the fact that the victim quit smoking around the time the offense occurred. Henderson points to no evidence to substantiate this assertion.

At sentencing, the trial court noted that the victim had returned home to his trailer and found the lights on and saw the shadows of people moving around inside. The court noted that the victim was understandably "[v]ery apprehensive," and he continued to experience anxiety for months after the incident. It is not necessary that the victim actually have sought psychological treatment in order for OV 4 to be scored at 10 points. MCL 777.34(2). We find that there was adequate evidence to support the score of 10 points for OV 4; therefore, Henderson is not entitled to resentencing. *Hornsby*, 251 Mich App at 468.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Cavanagh
/s/ Kurtis T. Wilder